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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

O'HARE TRUCK SERVICE, INC. and JOHN A. GRATZIANNA,

Petitioners,

v.

CITY OF NORTHLAKE, MAYOR REID PAXSON, and POLICE CHIEF SEYMOUR SAPOZNIK,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

I.
THERE ARE NO PROCEDURAL IMPEDIMENTS TO GRANTING CERTIORARI.

In an attempt to construct what they term "procedural considerations" as a barrier to granting certiorari, respondents argue for the very first time in this litigation that petitioners' suit against the City of Northlake is precluded by this Court's decision in *Monell v. New York City Department of Social Services* 436 U.S. 658 (1978). Respondents erroneously assert that petitioners have charged that the conduct of the individual defendants was in violation of the City's policy, rather than in conformity with governmental policy as required by *Monell*. Respondents' Brief in Opposition, 3-4 (hereinafter, "Opp. Cert. ___").

An examination of petitioners' First Amended Complaint (hereinafter, "complaint"), the allegations of which must be accepted as true in reviewing a decision granting a motion to dismiss, *Leatherman v. Tarrant County Narcotics Unit*, __ U.S. __, 113 S.Ct. 1160 (1993), reveals the fallaciousness of respondents' argument. In framing their First Amendment claim, petitioners allege that the Mayor was authorized to make policy, established a municipal policy of political retaliation, and acted pursuant to that policy when he ordered that petitioners be denied future towing business. Specifically, the allegations of the complaint state: (1) that respondent Mayor Paxson was at all relevant times, "the principal policy maker" for the City (Petition for Certiorari, Appendix, 21a, ¶ 4) (hereinafter "App. __"); (2) that respondent Police Chief Sapoznik, at the direction of the respondent Mayor, removed O'Hare from the rotation list in retaliation for petitioner Gratzianna refusing to support the Mayor's campaign for re-election (App. 22a-23a, ¶¶ 11, 12, 14); (3) that "it has been the policy and practice of Northlake, as set

by defendant Paxson, to use the powers and authority of Northlake to retaliate against political opponents of defendant Paxson" (App. 23a, ¶ 16); and, (4) that the actions of the mayor and police chief, "occurred in conformance with and as a result of the policy and practice of Northlake...." (*Id.*, ¶ 17). These allegations succinctly state a claim of municipal liability under *Monell* and its progeny.

Though petitioners did allege, for purposes of establishing a protectible due process interest, that prior to this incident Northlake had a policy and practice of participation in the towing program based on merit (App. 22a, ¶¶ 9-10), that allegation is not inconsistent with petitioners' further claim that, in this instance, respondents were acting pursuant to a policy of retaliatory termination. Moreover, it is clear from the complaint that such retaliation, in its application to towing services, represented a change in policy or a new policy. Respondents themselves recognize this fact. (Opp. Cert., 3-4).

Petitioners need not, as respondents argue, provide "evidence" as to whether retaliation was a new or changed policy. *Leatherman* specifically rejected a heightened pleading standard for cases alleging municipal liability under § 1983. In so doing, it resolved a conflict among the circuit courts, favoring those decisions exemplified by *Karim-Panahi v. Los Angeles Police Department*, 839 F.2d 621 (9th 1988). *Leatherman*, 113 S.Ct at 1161-62. *Karim-Panahi*, as recognized by this Court, reaffirmed circuit law that a claim of municipal liability under § 1983 will be sustained on a bare allegation that wrongful conduct conformed to official policy, custom or practice. *Id.*

Respondents' tactic of characterizing petitioners' claim as asserting respondeat superior liability and requiring the reversal of *Monell* is completely baseless. Petitioners have conformed their pleadings to the requirements of *Monell*

and *Leatherman* and seek to establish liability against the City of Northlake because the constitutional injury to petitioners was inflicted pursuant to municipal policy, not in contravention of it.

II.
THIS CASE RAISES DISTINCT ASSOCIATIONAL ISSUES WHICH REQUIRE THIS COURT'S CONSIDERATION.

1. Respondents further argue that this Court should not grant review in this case and instead, should resolve the important associational issues raised in our Petition when it renders its decision in *Heiser v. Umbehr*, No. 94-1654. (Decision below, *Umbehr v. McClure*, 44 F.3d 876 (10th Cir. 1995).) This Court should reject this suggestion because the interests presented in this case which involve political association and patronage are not raised by the free speech issue in *Heiser*.

Under the general rubric of "preservation of democratic process," this Court has identified a number of specific interests as relevant to the constitutionality of patronage-type practices. *Elrod v. Burns*, 427 U.S. 347 (1976). These include the role of partisan politics and the stability of the two-party system. *Id. See also Rutan v. Republican Party of Illinois*, 497 U.S. 62, 104-110 (1990) (Scalia, J. dissenting). While these interests are clearly implicated in this case (Opp. Cert. 5-9), they are not at issue in *Heiser* where the Tenth Circuit correctly found that this Court's patronage cases were of only "limited relevance." *Umbehr*, 44 F.3d at 883. Furthermore, in briefings before this Court, both parties in Heiser have stated that Mr. Umbehr's political association was not involved in the termination of his contract with

Wabaunsee County. (Brief of Petitioner at 15; Brief of Respondent at 26-27).

2. Respondents seek to establish the correctness of the decision below asserting that "[i]n this, if not all cases, involving independent contractors performing governmental services, Petitioners' political loyalty is related to effective performance of the function involved." (Opp. Cert. 5) However, respondents' implicit admission that in some instances, political loyalty is not required of governmental contractors, counsels the acceptance of the case for review. There should be no blanket exception to basic rights of political association for independent contractors. In fact, in the case relied upon by respondents to support this proposition, *Selch v. Letts*, 5 F.3d 1040 (7th Cir. 1993), the Seventh Circuit engaged in a detailed functional analysis of the duties of the employees before deciding whether political affiliation was a valid employment requirement. *Id.* at 1045-47.

Respondents also seem to suggest that *Selch* supports allowing government to consider political affiliation whenever independent contractors provide public services such as maintenance of the highways. (Opp. Cert. 6). However, the *Selch* Court found political association to be a valid consideration only because the supervisory level employee had the authority to decide where and when work was to be completed and because he was responsible for investigating and responding to complaints from the public. *Selch*, 5 F.3d at 1046-1047. Petitioners, like many government contractors, simply do not possess that type of discretion or authority and provide services within a narrowly defined area. This Court should, as requested in our Petition, determine the circumstances and standards under which government may, if ever, consider the political association of those contractors to whom it gives business.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the Court should hold the petition for rehearing pending the resolution of *Heiser*.

Respectfully submitted,

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